No. 10140 6

In the United States
Circuit Court of Appeals
For the Ninth Circuit

MATTHEW EDWARD DEADY, HANOVER DEADY, and THE FIRST NATIONAL BANK OF PORTLAND, a national banking association,

Appellants,

vs.

RICHARD HOWELL,

Appellee.

RICHARD HOWELL,

Cross-Appellant,

vs.

MATTHEW EDWARD DEADY, HANOVER DEADY, and THE FIRST NATIONAL BANK OF PORTLAND, a national banking association,

Cross-Appellees.

Appellee's Answering Brief and Cross-Appellant's Opening Brief

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Upon Appeals from the District Court of the United States for the District of Oregon.

HON. JAMES ALGER FEE, District Judge

SIMON, GEARIN, HUMPHREYS & FREED,
EDGAR FREED,
1111 Failing Building, Portland, Oregon; and
CAKE, JAUREGUY & TOOZE,
NICHOLAS JAUREGUY,
Yeon Building, Portland, Oregon,
Attorneys for Appellants and Cross-Appellees.

MAGUIRE, SHIELDS, MORRISON & BIGGS,
ROBERT F. MAGUIRE,
723 Pittock Block, Portland, Oregon; and
JOHN SCOBLE,
55 Liberty Street, New York,
Attorneys for Appellee and Cross-Appellant.

HOUGHTON-CARSON COMPANY, PRINTERS

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Appellee's Answering Brief

Upon Appeals from the District Court of the United States for the District of Oregon.

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JURISDICTION OF THE COURT

The jurisdiction of the District Court in this case is based upon diversity of citizenship (28 U.S.C.A., Sec. 41-1), it appearing from the Pre-Trial Order that the plaintiff is a citizen of Connecticut (Tr. 72-3), the defendants are citizens of Oregon (Tr. 73) and the matter in controversy involves real

property and the income therefrom which exceeds in value the sum of $3,000 (Tr. 73).

The jurisdiction of the Circuit Court of Appeals to review the decree of the District Court (Tr. 178) is based upon 28 U.S.C.A., Sec. 225, it being a final decision in the District Court, a direct review of which may not be had in the Supreme Court under 28 U.S.C.A., Sec. 345.

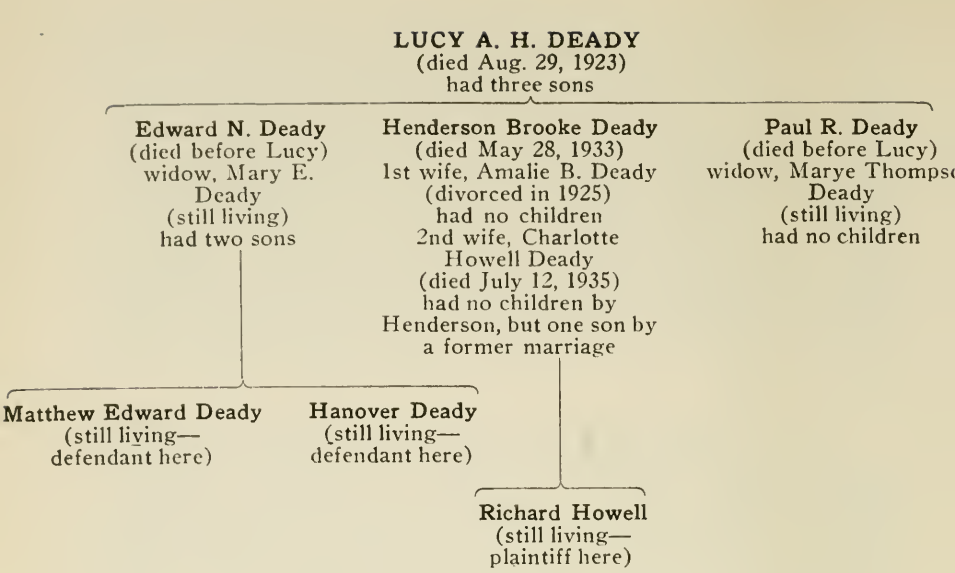
STATEMENT OF THE CASE

This is a suit for declaratory and equitable relief, seeking a construction of the will of Lucy A. H. Deady, who died in Multnomah County, Oregon, on August 29, 1923. The particular property involved is a business site in downtown Portland, known as Lot One (1), Block Two Hundred Twelve (212), which is now held and managed by the defendant bank, purporting to act as a trustee under the will.

The plaintiff claims to be the owner in fee simple of an undivided two-thirds interest in the property, subject to certain charges, and asserts that he is being wrongfully deprived of the possession and income therefrom, asking, among other things, for an accounting of the rents and profits. The trial court decided in plaintiff's favor as to his interest under the will, and decreed an accounting, but held that by reason of a stipulation dated October 28, 1925, he is not entitled to any of the income from the property until the death of Marye Thompson Deady.

Defendants have appealed from the entire decree, and plaintiff has cross-appealed from that portion of the decree which denies him any right to the present income. Pursuant to stipulation approved by this court, plaintiff combines herewith his answering brief as appellee and his opening brief as cross-appellant. For simplicity, the designations in the lower court as "plaintiff" and "defendants" are used herein.

Plaintiff derives his claim to the property through his deceased mother, Charlotte Howell Deady, who was the wife of Henderson Brooke Deady. Henderson was a son of Lucy A. H. Deady, the testatrix whose will is in question. Plaintiff contends that by the will of Lucy, Henderson took a fee simple interest in two-thirds of the property, which he devised to his widow, Charlotte, who in turn devised to the plaintiff. The defendants contend that Henderson took only a defeasible fee which terminated on his death, and that his interest then passed to defendants, Matthew and Hanover, nephews of Henderson and grandsons of Lucy. For the convenience of the court a chart of the family is printed herewith:



The principal dispute revolves about the construction of Paragraphs 3 and 7 of Lucy's will. The entire will is set out in the transcript (pages 34, et seq.) and is considered in detail at a later point herein, but those paragraphs are here repeated:

> "Third: Subject to the conditions, provisions and charges thereon hereinafter made, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two-thirds of Lot numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon."
>
> "Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons."

In this respect, the plaintiff contends that the failure of issue mentioned in Paragraph 7 refers to the event of Henderson's death without issue prior to the death of the testatrix, and that since he survived the testatrix his fee simple interest became absolute and indefeasible. The defendants on the other hand, contend that the clause must be taken to refer to the death of Henderson at any time without issue, and that since he did not have children at the time of his death, his interest was defeated and passed to Matthew and Hanover.

Plaintiff likewise contends that Paragraphs 5 and 6 of the will are invalid, as contravening settled rules of law. Paragraph 5 provides for the accumulation of a certain portion of the income from the property for an indefinite period in a sinking fund for the purpose of retiring the mortgage debt against the property; and Paragraph 6 imposes a restraint on the alienation or incumbrance of the property for the absolute period of 25 years. Plaintiff likewise contends that no valid trust was created by the will, and hence the possession of the bank as purported trustee under the will is utterly wrongful. With respect to the stipulation of October 28, 1925, on the basis of which the trial court denied to the plaintiff any right to the present income during the life of Marye, plaintiff contends that there is nothing in that stipulation to prevent the residue of the income, after the payment of the charges, from following the ownership of the property.

Defendants have urged (Br. p. 7) that the invalidity of Paragraphs 5 and 6 is immaterial unless the plaintiff first establishes that he has an interest in the property. This argument completely begs the question, however, for the fact of the invalidity is itself of considerable weight in determining the proper construction to be given to the will. Plaintiff contends that because the principal features of Lucy's plan of disposition cannot be legally carried out, and since those elements are so closely interwoven with the rest, the entire plan as to this property must fail, and under the residuary clause (Par. 12) Henderson would take two-thirds in fee and Matthew and Hanover would each take one-sixth, thus reaching the same result in the end as under the construction of paragraph 7 for which we contend.

Before considering these arguments in detail, we set forth here a summary of the pertinent

PROPOSITIONS OF LAW

I.

In the construction of an Oregon will devising real property located in Oregon, a federal court sitting in Oregon must follow the Oregon law. If the state court has not passed directly on the question, the federal court must attempt to determine what the state law would be if the question were presented, by applying the principles which the state

court would have applied—there being no "federal common law."

Barber vs. Pittsburgh, 166 U. S. 83, 17 S. Ct. 488.

Clarke vs. Clarke, 178 U. S. 186, 20 S. Ct. 873.

Erie Railway vs. Tompkins, 304 U. S. 64, 58 S. Ct. 817.

II.

In construing a will, it is not simply the intention of the testatrix, but the *expressed* intention, as gathered from the words used, which governs.

Stubbs vs. Abel, 114 Ore. 610, 619; 233 Pac. 852.

Boren vs. Reeves, 73 Ind. App. 604; 123 N. E. 359, 360.

Painter vs. Hirschberger, 340 Mo. 347, 100 S. W. 2d 532.

Consequently, where technical words are used, or words which have a settled legal significance, they will normally be given their technical meaning, especially when the instrument is obviously prepared by a skilled draftsman.

Fowler vs. Duhme, 143 Ind. 248; 42 N. E. 623, 626.

69 C. J. 76, Wills, Sec. 1129.

III.

Even the expressed intent of the testatrix will not be given effect, however, if that intention offends against public policy or some positive rule of law. And where such a rule of law operates to defeat intent, the will must be interpreted in the first instance

as if the rule did not exist, and then to the provision so construed the rule must be "remorselessly applied."

Closset vs. Burtchaell, 112 Ore. 585, 601; 230 Pac. 554.

Matter of Wilcox, 194 N. Y. 288; 87 N. E. 497.

Gray on Perpetuities (3rd Ed.) Sec. 629.

IV.

It is a well recognized rule, in this state embodied in statute, that where an estate in fee is given in one clause of a will, the estate thus granted cannot be taken away or diminished by any "subsequent vague or general expression of doubtful import," but the intent to debase the fee must *clearly appear from the will.*

"A devise of real property shall be deemed and taken as a devise of all the estate or interest of the testator therein subject to his disposal, unless it *clearly appears from the will* that he intended to devise a less estate or interest;" O. C. L. A., Sec. 18-603 (italics supplied).

"The term 'heirs' or other words of inheritance, shall not be necessary to create or convey an estate in fee simple: and any conveyance of any real estate hereafter executed shall pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or be necessarily implied in the terms of the grant." O. C. L. A., Sec. 70-105.

Irvine vs. Irvine, 69 Ore. 187, 190; 136 Pac. 18.

Imbrie vs. Hartrampf, 100 Ore. 589, 595; 198 Pac. 521.

V.

The provision in Paragraph 5 of the will for the accumulation of a portion of the income for an indefinite period in a sinking fund for the payment of the mortgage indebtedness, and likewise the twenty-five-year restriction on alienation or encumbrance in Paragraph 6, are void as violating the rule against perpetuities, the rule against accumulations and the rule against restraints on alienation.

Closset vs. Burtchaell, 112 Ore. 585; 230 Pac. 554.

Friswold vs. U. S. Nat'l Bank, 122 Ore. 246; 257 Pac. 818:

" 'Where it is apparent from the words of the will that the dominant purpose of the testator is to devise a fee simple estate, and the subsequent language indicates merely a subordinate intent to strip the estate thus given of one or more of its inherent attributes, the law will hold that this cannot be done; and the fee simple estate passes to the devisee with all of its inherent qualities'."

41 Am. Jur. 89 et seq., 108 et seq.; Perpetuities, Secs. 44 et seq., 66 et seq.

48 C. J. 989, Perpetuities, Sec. 80.

69 C. J. 661-664, Wills, Secs. 1758-1762.

VI.

Where provisions in a will are so closely interwoven that the invalid features cannot be separated from the valid ones without seriously upsetting the

general testamentary scheme, the entire plan of distribution will be held invalid.

69 C. J. 117, Wills, Sec. 1159.

28 R. C. L., 358-9, Wills, Sec. 360.

Reid vs. Voorhees, 216 Ill. 236; 74 N. E. 804; 3 Ann. Cas. 946.

VII.

At common-law a gift over on death without issue was construed to mean *indefinite failure*—that is, the extinction of the first taker's line of descendants at any time in the future. Under this construction the limitation created a remainder after an estate in fee tail.

Barber vs. Pittsburgh Railway, 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925, 935.

11 R. C. L. 481, Executory Interest, Sec. 19, Note 13

28 R. C. L. 259, Wills, Sec. 231, Note 10.

69 C. J. 308, Wills, Sec. 1331, Note 87.

Warren, *Gifts Over on Death Without Issue,* 39 Yale Law Journal 332.

"An executory devise to take effect only upon an indefinite failure of issue is void under the rule against perpetuities."

Imbrie vs. Hartrampf, 100 Ore. 589, 599; 198 Pac. 521.

3 L. R. A. (N. S.) 1144.

19 A. J. 581, Estates Sec. 124.

VIII.

The weight of authority, recognized as such by the Oregon Supreme Court, is to the effect that a gift over on death without issue refers to the death of the first taker *within the lifetime of the testator,* unless a different intent appears from the context of the Will.

28 R. C. L., Wills, Sec. 231:

> "It is the general rule that where property is devised to one with a provision for a gift over in case of the death of the legatee or devisee without issue, or without having surviving issue, the event referred to is death without issue *during the lifetime of the testator.*"

Love v. Walker, 59 Ore. 95, 107:

> "The rule of construction prevailing in most states of the Union is that a devise of a fee, coupled with a condition that if the devisee die without issue the estate is to go to others, means dying without issue in the lifetime of the testator unless a different intention is manifest from the context of the Will."

Imbrie v. Hartrampf, 100 Ore. 589, 599; 198 Pac. 521.

(Quoting the following with approval from Ann. 25 L. R. A. (N. S.) 1045, 1059-1063):

> "It is well settled that where the terms of the will indicate an intention that the primary devisee shall take the fee on the death of the testator, coupled with a devise over in case of

his *death without issue, the words refer to a death without issue during the life of the testator;* and where the primary devisee, surviving the testator, takes an absolute estate in fee simple, this rule of construction is adopted in order to avoid repugnancy, and because the law favors the vesting of estates at the earliest possible moment, in the absence of a clear manifestation of the intention of the testator to the contrary: *Tarvell v. Smith,* 125 Iowa, 388 (101 N. W. 118).

"Where a bequest is direct and immediate, and nothing else appears to aid in the interpretation, *the law inclines to construe 'die without issue' as meaning the death of the legatee without issue in the testator's lifetime: Birney v. Richardson,* 5 Dana (Ky.) 424. * * *

"So, also, in *Washbon v. Cope,* 144 N. Y. 287 (39 N. E. 388), it is said that the rule is well settled that where a devise or bequest over to third persons is dependent upon *death without issue* or without children, *the death referred to is death in* the lifetime of the testator." (Italics Supplied)

IX.

The following are representative of the great number of cases which follow the substitutional rule and construe the gift over to take effect only if the first taker dies without issue *during the lifetime of the testator*

Wallace vs. Stone Co., 76 Fed. (2d) 269, 271 (3rd Cir.).

First Nat'l. Bank of Covington vs. DePauw, 86 Fed. 722, 724 (7th Cir.).

Darrow vs. Florence, 206 Ala. 675; 91 So. 606, 607.

Lawlor vs. Holohan, 70 Conn. 87; 38 A. 903, 904.

Fowler vs. Duhme, 143 Ind. 248; 42 N. E. 623, 627.

Quilliam vs. Union Tr. Co., 194 Ind. 521; 142 N. E. 214, 217.

Blain vs. Dean, 160 Iowa 708; 142 N. W. 419, 421-422.

Prewitt vs. Prewitt, 178 Ky. 346; 198 S. W. 924, 925.

Lumpkin vs. Lumpkin, 108 Md. 470, 70 A. 238, 25 L. R. A. (N. S.) 1063.

Palmer vs. French, 326 Mo. 710; 32 S. W. (2d) 591.

Davis vs. Davis, 107 Neb. 70; 185 N. W. 442.

Snyder vs. Taylor, 88 N. J. Eq. 513, 103 A. 396, 398.

Washbon vs. Cope, 144 N. Y. 287, 39 N. E. 388, 391.

In re Sewald's Est., 281 Pa. 483, 127 A. 63.

Steere vs. Phillips, 61 R. I. 232, 200 A. 970, 972.

Scruggs vs. Mayberry, 135 Tenn. 586, 188 S. W. 207, 209-10.

In re Gulstine's Est., 166 Wash. 325; 6 Pac. (2d) 628, 631.

In re Caldwell's Will, 205 Wis. 587, 238 N. W. 367, 368.

X.

As a corollary to the substitutional rule, it is held that where a remainder is created after a life estate,

and the remainder is subject to a limitation over in case the remainder-man should die without issue, the remainder-man takes an absolute fee if he survives the life tenant.

Boynton vs. Boynton, 266 Mass. 454; 165 N. E. 489, 491.

Ewart vs. Dalby, 319 Mo. 108; 5 S. W. (2d) 428, 434.

Davis vs. Scharf, 99 N. J. Eq. 88; 133 A. 197.

Flores vs. Degarza, 44 S. W. (2d) 909 (Tex.).

Wolf vs. Van Nostrand, 2 N. Y. 436.

XI.

If Henderson had predeceased the testatrix, without leaving issue, the devise to him would have lapsed, since the Oregon Lapse Statute applies only where the devisee leaves *lineal descendants.* His share would therefore have gone to Matthew and Hanover by way of intestate succession, rather than under the terms of the Will, and it would have been freed from all the restrictions and charges of the Will.

> "When any estate shall be devised to any child, grandchild, or other relative of the testator, and such devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real and personal, as such devisee would have done in case he had survived the testator." O. C. L. A. Sec. 18-604.
>
> "When any person shall die seized of any real property, or any right thereto, or entitled to any interest therein, in fee simple, or for the

life of another, not having lawfully devised the same, such real property shall descend subject to his debts, as follows: (1) in equal shares to his or her children, and to the issue of any deceased child by right of representation; and if there be no child of the intestate living at the time of his or her death, such real property shall descend to all his or her other lineal descendants." O. C. L. A. Sec. 16-101.

XII.

A power of appointment may be validly exercised by a document executed prior to the actual creation of the power, if the intent to do so clearly appears.

Title Guaranty Trust Co. vs. Ebaugh, 184 N. Y. S. 351.

Stone vs. Forbes, 189 Mass. 163, 168; 75 N. E. 141.

41 Am. Jur. 833-5, Powers, Secs. 40-42.

49 C. J. 1284, Powers, Sec. 106.

This result is sometimes reached by the doctrine of *incorporation by reference,* even in jurisdictions which ordinarily say that a power lapses on the death of the donee prior to that of the donor.

In re *Fowle's Will,* 222 N. Y. 222; 118 N. E. 611, 612-13.

Matter of Piffard, 111 N. Y. 410; 18 N. E. 718; 2 L. R. A. 193.

XIII.

Although no particular form of words is necessary to the creation of a trust, there must at least be a

manifested intention that the one alleged to be a "trustee" should take title to certain property and hold it for the benefit of another The mere use of the word "trustee" is not of itself sufficient to create a trust or to indicate that a trust was intended.

Scott on Trusts, Sec. 24.

The fee title and ownership of real property of a decedent passes immediately on his death to his heirs or devisees subject only to the payment of the debts of the deceased and the right of the personal representative to possession for the purpose of administration.

D'Arcy vs. Snell, 162 Ore. 351, 364; 91 P. 2d 537.

XIV.

Parol evidence of the acts or declarations of a testatrix are not admissible to explain, modify or vary the construction of a testament or to determine the nature or extent of the interest devised.

Hansen vs. Ore. Humane Society, 142 Ore. 104, 118; 18 P. 2d, 1036.

Re Estate of Hodgin, 110 Ore. 381; 221 Pac. 169.

Closset vs. Burtchaell, 112 Ore. 585; 230 Pac. 554.

Stubbs vs. Abel 114 Ore. 610; 233 P. 852.

Soules vs. Silver, 118 Ore. 96; 245 Pac. 1069.

Anno. 94 A. L. R. 26, 269:

"Since the nature or extent of the estate or interest devised is determined by the legal effect of the language of the will, this question must be determined by the process of construction according to established legal principles, and evidence of the testator's declarations of intention is not admissible to show the character or quantum of estate intended to be devised."

XV.

(A) Evidence of the practical construction of a will by the interested parties, if admissible at all, may be received only when the will is clearly ambiguous.

Campbell vs. Fowler, 226 Ky. 548, 11 S.W. (2d) 423, 428.

Eagen vs. Commissioner, 43 F. (2d) 881, 71 A. L. R. 863 (5 Cir.).

Bishop vs. Howarth, 59 Conn. 455, 22 A. 432.

(B) When practical construction is admissible, it is not for the purpose of showing the testator's *intent,* but rather because the construction has become *independently binding* on the parties for some reason. In all the cases of this type there are some one or more of the following factors present:

(1) The property of the decedent has been divided and entirely distributed according to a certain construction of the will, and all parties have acquiesced for a considerable length of time.

(2) There has been a specific agreement of the

parties to a certain plan of distribution. If this is of the nature of a family settlement, the courts will go to some lengths to uphold it.

(3) The parties have disposed of the property among themselves or to outsiders, on the assumption of ownership, so that if the plan is upset, the property rights of third parties would be affected.

(4) The person against whom the construction is offered was himself a party to that construction, so that it comes within the nature of an admission.

Anno. 67 A. L. R. 1272.

Anno. 94 A. L. R. 26, 245.

CONSTRUCTION OF "DEATH WITHOUT ISSUE"

As was pointed out by the trial court (Tr. 44), controversies innumerable have been waged over the words "die without issue", and the construction of the phrase has changed with the time, the jurisdiction, the statutory background and public policy. In the course of decisions, at least four lines of approach have evolved for determining the effective date of the gift over in the limitation "A to B, and if B dies without issue, over to C."

Indefinite Failure.

At common law there was a presumption that such a limitation refers to *indefinite failure*—i. e. the gift over takes effect if B's line runs out *at any*

time in the future. This view created an estate tail in B with a remainder over to C. Prior to the Statute of Uses (1536) and the Statute of Wills (1540) such a construction was necessary, because there was no such thing as an *executory devise,* and the gift over had to be construed as a *remainder* in order to be good at all. This construction moreover harmonized with the strong emphasis on family lines prevalent in England at that time, under which an extensive system of entailment had grown up.

After the enactment of the Statute of Uses and the Statute of Wills, an executory devise was permitted, but concurrently the *rule against perpetuities* developed, under which, if the gift over took effect as an *executory interest* on an *indefinite failure,* it would be *void for remoteness.* The rule against perpetuities did not prohibit interests after a fee tail, however, for the estate tail could always be *barred* by the "common recovery", so the construction continued to be as a remainder after an estate tail, based on indefinite failure.

In this country a number of jurisdictions still retain the common-law meaning, in the absence of words indicating a contrary intent, while a number have rejected it in favor of some form of a definite failure construction, and at least 28 states have enacted the definite failure construction into statute. (See Warren, Gifts Over on Death Without Issue, 39

Yale Law Journal 332; Restatement Property, Sec. 266, Special Note).

As pointed out above (Proposition No. VII, supra, Page 10), if this clause is given its settled common-law meaning, the gift over would be void for remoteness, because there is no assurance that it would take effect within the period permitted by the rule against perpetuities. In that event, obviously Henderson's estate would be absolute.

Definite Failure

Under the *definite failure* rule, the limitation is construed so that the gift over takes effect, if at all, *on some definite date,* rather than on the failure of the line at any future time. As pointed out above, where this rule has been adopted it is generally by means of statute. In the field of property law, it is axiomatic that "it is better that the rule be settled, than that it be settled right"; and the courts are slow to upset property rights by changing settled rules, feeling that such changes are better left to the legislature.

Frequently, though not necessarily, in states which have not adopted the substitutional rule, the gift over is held to take effect on the death of the first taker. Thus C would take if B dies without issue living at the time of his death, no matter when B's death occurred.

It is not essential to the definite failure rule, however, that it refer to the death of the first taker—*any*

definite date will suffice. Thus the gift over may take effect upon the death of the first taker without issue prior to his *attaining a certain age*. The substitutional rule itself is a means for ascertaining a definite date, and is applied in many of the jurisdictions in which the preference for definite failure exists either by statute or decision.

Substitutional Rule

Under the *substitutional* rule, one or the other of the alternative limitations takes effect *at the death of the testator*. Thus if B dies without issue prior to the death of A, C takes absolutely upon A's death. On the other hand, if B outlives A, he takes absolutely upon A's death whether or not he subsequently dies without issue. The clause is construed to mean "death without issue *in the lifetime of the testator,*" and C is *substituted* for B, if at all, upon the death of A. It is believed that this construction is followed by the weight of authority in the absence of language clearly indicating a contrary intent.

(Propositions Nos. VIII and IX, supra, Pages 11 and 12.)

A number of reasons have been given by the courts in explaining the preference for the substitutional construction. In the first place, it provides a definite date, in those jurisdictions where definite failure is established, and removes all uncertainty as to the time when the gift over is to take effect. In the second place, it gives effect to the policy of the

law in favor of the early vesting of estates, because the devise vests completely when the Will first speaks.

Furthermore, the substitutional construction is most likely to be in accord with the testator's actual intent, because it avoids any suggestion of repugnancy. When a testator gives an absolute fee in one clause, he is not likely to turn around and take it away in another, and he will not be presumed to have done so unless the intent clearly appears.

Again, there is a strong presumption that a testator intends to prevent a lapse in his disposition, as would usually happen if a devisee predeceased the testator. Consequently it is presumed that this clause was designed to avoid a lapse by giving the property to another if the first taker predeceased the testator. It is pointed out subsequently that this reason furnishes a very convincing argument for the substitutional construction in the present case.

Intermediate Date Rule

There is a further rule, as a phase of the definite failure construction, which has been adopted in some of the jurisdictions which do not follow the substitutional construction—namely: If there is any *intermediate date,* between the death of the testator and the death of the devisee, which can fairly be found, it will be used in preference to the death of the devisee; and if there are several possible intermediate dates, the earliest date which will vest the estate indefeasibly is preferred.

This rule again gives effect to the policy of the law in favor of early vesting, and it likewise enables the courts to determine from the Will as a whole whether there was any particular date deemed by the testator to be crucial to the plan he had in mind.

In the present case, it is possible that such an intermediate date might have been found in the twenty-five-year restraint on alienation in Paragraph 6 of the Will. However, since that restraint is void, there is no valid intermediate date which could be used.

THE OREGON CASES

Rowland v. Warren, 10 Ore. 129.

Here the will provided: "I further will that if my daughters, Martha Ann and Mary E. Hambree, die without children the land shall revert back to my other heirs."

Mary survived the testator and *died leaving children.* The court properly held that regardless of whether she took a fee simple or a fee simple conditional *the contingency did not happen* and a purchaser from her at judgment sale took absolute title. Hence the case could not and did not decide anything as to the meaning of "die without issue."

Buchanan v. Schulderman, 11 Ore. 150; 1 Pac. 899.

Here the will provided for a life estate in the testatrix' two daughters with contingent remainders

to the children of each daughter "or in case of the death of either of said daughters, without issue, then the children of the other daughter to take all of the same * * *."

The only question in the case was whether or not such a limitation was void as contrary to the rule against perpetuities No question of the meaning of death without issue was or could be involved because the estate given to the daughters was not a fee simple subject to an executory limitation, but it was merely a life estate, and the limitation above set out merely operated to prevent a reversion in the event one of the contingent remainders should fail for lack of children living at the death of the life tenant. In other words, it was only a question of cross remainders and not a question of cutting down a fee.

Shadden v. Hembree, 17 Ore. 14; 18 Pac. 572.

The will here set up a life estate in the testator's wife, remainder to his son Henry L. Hembree "except as herein provided". Thereafter in the sixth clause of the will the testator provided:

> " 'Sixth. It is my will that in the event that my beloved wife and son, Henry M. Hembree, shall die before my son shall become twenty-one years of age, that it is my will that my real estate shall descend to my nephew, Frank M. Shadden, and in the event mentioned, I do so will and bequeath the same to him".

The court held that upon the son surviving the wife, he took an absolute fee simple and that the

heirs of the nephew had no interest in the property.

With regard to the rule that where a definite failure of issue is intended, death prior to that of the testator is presumed to be referred to, the court states:

> "* * * such is the settled rule where other parts of the will, *aside from* the words of absolute gift, followed by a gift over in case of death, *or death without issue*, do not indicate a contrary intention."

The court here ruled that by the creation of a prior life estate in the wife giving her the use, control and management of the property, if she remained a widow, the testator intended the death of the son without issue to refer to his death prior to that of the widow.

Therefore, while the case is merely a dictum for the points here at issue, it is noteworthy that in so ruling the Oregon court adhered to the corollary of the general rule which is applied where there is a prior life estate created in the will with a remainder in fee subject to a limitation over in case the remainderman should die without issue; that is, the courts construe the will in such a case as giving to the remainderman an absolute fee at the earliest moment when he is given the right to possession, control, and freedom to sell or encumber a present interest and enjoyment in the property, towit, immediately upon the death of the life tenant. This is a corollary to the settled rule that where there is no

prior life estate a death of the first taker prior to the death of the testator is intended where there is a limitation over upon death of the first taker without issue. And it is noteworthy that this corollary is laid down by the same courts which adhere to the settled rule in situations such as involved in the present case.

(Proposition No. X, supra, P. 13.)

Love v. Walker, 59 Ore. 95; 115 Pac. 296.

By his will the testator gave his son, Green C. Love, one of the six equal shares in his estate and then provided by *codicil,* as follows:

> "Third, I hereby will, decree and declare that the devise or legacy in my said will, to my son, Green C. Love, shall be for his sole and separate use, independent of his wife, at all times, and that in case of his death without lawful issue, born alive and living at the time of his death, then the said devise or legacy to him shall belong and go to the remaining devicees of my said will in proportion as they hold of the shares or parts of my said will."

The court held that by reason of the fact that this provision occurred in a codicil the testator must have to some extent, intended to *revoke* his former gift, and that Green C. Love should be entitled only to a life estate with a remainder over in his issue living at the time of his death. The court, however, points out:

> "The rule of construction prevailing in most

states of the Union is that a devise of a fee, coupled with a condition that if the devisee die without issue the estate is to go to others, means dying without issue in the lifetime of the testator, unless a different intention is manifest from the context of the will."

* * * *

"If, after giving a fee to plaintiff, the will had also included the third clause of the codicil, it is possible that a presumption might be invoked that the condition of dying without living issue would be construed to mean the death of plaintiff before that of the testator, so that on the happening of the latter event the absolute estate would have become vested in Green C. Love of which he could not have been deprived on account of any failure of issue him surviving. But, however this may be, the legal principle thus adverted to can, in our opinion, have no application to the case at bar, for in so far as the codicil conflicts with the will it is the last expression of a testamentary disposition of property, revoking the will to the extent of the disagreement in their provisions and preventing a construction of their terms with reference to each other." (59 Ore. 107-108)

It should also be noted that Mr. Justice Burnett delivered a dissenting opinion, ruling that since the son survived the period for distribution, he should then be entitled to take the property absolutely. And it is noteworthy that as to personal property, of which there is no transfer of title until time of distribution, this rule of limiting the devise over to the death of the first taker prior to the period of distribution is an exact corollary with the rule limiting

the devise over in the case of real property to his death prior to that of the testator.

Kaser v. Kaser, 68 Ore. 153; 137 Pac. 187.

Here the sole question was whether or not the plaintiff had any interest in the *personal property* of the testator's estate after the determination of the defendant's life interest in the property. By his will the testator provided first, a life estate for his wife; second, that upon her death his property should be divided between his children, and

> "The third clause of the will is the paragraph the meaning of which is doubtful It is there stated: 'In the event that any of my children * * * die, leaving lawful issue, it is my will that said issue take the share left to their parent.' The time of the death of such child is not specified. Whether such death was contemplated before the death of the testator, upon the death of the defendant, or at any other time, is not specifically indicated. That clause further provides that, if any of the testator's children should marry and die leaving a spouse but no issue, such surviving husband or wife was to take nothing by the will."

The court examines this language and determines that it means a death after that of the testator and also determines that by use of the limitations concerning absence of issue in connection with the surviving husband or wife of such child the rule as to indefinite failure of issue did not apply, stating:

> "In the third clause the testator directs that if any of his children should marry and die leav-

> ing a husband of (or) wife surviving 'but no issue,' etc. Here the term 'dying without issue' evidently means a definite failure of issue; that is, dying without lineal descendants;"

Here again, the court simply rules that the legatees were given a life interest with the remainder over to their lawful issue and no question of cutting down a prior fee is involved since their life estate must terminate at their death, whether before or after that of the testator.

Bilyeu v. Crouch, 96 Ore. 66; 189 Pac. 222.

This case is likewise not a binding precedent for the one here before the court, because the estate of Frank Ingram was preceded by a life estate, and in such cases, as we have pointed out, the rule of construction that the death prior to that of a testator is intended, does not apply. The court, however, does not rely on any rules of construction but points out that by reason of the complicated series of limitations on the various estates created following the life estate, each being limited first to the male heirs and then to the female heirs of the devisee and then over to the other children, clearly the testator was not thinking in terms of the death of one of those children prior to his death. The court observed that the testatrix

> "Although seized of a fee simple estate in the land, devised to her immediate beneficiaries a *less* estate. We note first the life estate to her husband; second, to Frank Ingram and the heirs

> male of his body; third, in default of male children, to his daughters; and lastly, in default of issue of his body, to his sisters. *It was plain that the testatrix never intended that her son Frank should take an absolute fee-simple estate in the land.* It is manifest that she intended to control the stream of descent as it affected the land, long after her death. This is shown by the fact that she interposed a *life estate of her husband, which would not come into existence until after her decease* and which should be fulfilled before Frank Ingram could come into the enjoyment of the property."

As to the court's reference to the *Rowland* case, supra, it has been shown that it *could not possibly* have foreclosed the substitutional construction, because the question was not there presented.

Imbrie v. Hartrampf, 100 Ore. 589; 198 Pac. 521.

Here after giving certain land to his son, Ralph Imbrie, subject to certain restrictions on his right to sell or mortgage the same, the testator in paragraph twelve stated as follows:

> " 'I further bequeath, devise and direct that should any of the above named devisees die without leaving lineal descendants, children or grandchildren, then in that case, all of the property above devised to such devisee shall go in equal shares to his or her brothers and sisters then living, or to the children of any brother or sister then deceased, by right of representation.' "

The court ruled that upon Ralph Imbrie surviving the testator he took an absolute title in fee simple to the real estate described in paragraph seven of the will. Apparently two contentions were made by the appellant, to-wit (1) that Ralph Imbrie was vested only with a life estate with the remainder over to his children or grandchildren; and, (2) that if Ralph Imbrie did get a fee it was a qualified fee determinable upon his death at any time without lineal descendents, children, or grandchildren (100 Ore. at 598).

In rejecting the contention that Ralph Imbrie got merely a life estate the court points out that the restriction upon alienation for a period until he was forty years of age merely indicated an intention that after arriving at the age of forty Ralph Imbrie should have full power of alienation of the property.

On the question of whether or not an indefinite failure of issue was intended by the use of the words "without leaving lineal descendents, children, or grandchildren," the court makes no definite statement with regard to the wording of that particular will, simply stating, as follows:

> "An executory devise to take affect only upon an indefinite failure of issue is void under the rule as to perpetuities, for an executory interest, in order to be valid, must ake effect within the life or lives of those in being, and within 21 years thereafter, with the usual period of gestation added."

The court then goes on to take up the situation involved if a definite failure of issue is intended quoting from the case of *Love v. Walker,* and laying down the rule to be, as follows:

> "Turning to the foundation of that enunciation, 25 L. R. A. (N. S.) 1059 et seq., we find among numerous authorities cited in the notes the following on page 1060:
>
> " 'It is well settled that where the terms of the will indicate an intention that the primary divisee shall take the fee on the death of the testator, coupled with a devise over in case of his *death without issue, the words refer to a death without issue during the life of the testator;* and where the primary devisee, surviving the testator, takes an absolute estate in fee simple, this rule of construction is adopted in order to avoid repugnancy, and because the law favors the vesting of estates at the earliest possible moment, in the absence of a clear manifestation of the intention of the testator to the contrary: Tarvell v. Smith, 125 Iowa, 388 (101 N. W. 118).
>
> " 'Where a bequest is direct and immediate, and nothing else appears to aid in the interpretation, the *law inclines to construe "die without issue" as meaning the death of the legatee without issue in the testator's lifetime:* Birney v. Richardson, 5 Dana (Ky.), 424 * * *
>
> " 'So, also, in Washbon v. Cope, 144 N. Y. 287 (39 N. E. 388), it is said that the rule is well settled that where a devise or bequest over to third persons is dependent upon *death without issue* or without children, *the death referred to is death in the lifetime of the testator.*'
>
> *"The fact that our Code is closely related to those in the states of Iowa and New York lends*

weight to the opinions in those states. In the present case, instead of the language of the will, other than that in paragraph 12, manifesting an intention of the testator to devise an estate less than that of fee simple, the expression of the will of the devisor is to the contrary as we have noted.

"We therefore conclude that the proviso that in the event Ralph Imbris should 'die without leaving lineal descendants, children or grandchildren,' etc., was not inserted in the memorandum of the testator with the intention of debasing the fee devised to Ralph Imbrie, or indicating that Robert Imbrie proposed to give to this son an estate less than an absolute fee simple after he attained the age of 40 years without violating any of the restrictions embodied in paragraph 7."

Thus, with regard to the Oregon authorities we would point out that the court never has squarely passed upon the common law meaning of the words "die without issue", and also that the court has squarely recognized as the settled rule the construction presuming that the testator intends to refer to a death *prior to his own death* when he uses the words "die without issue" in a limitation over upon an estate given to a primary beneficiary. Furthermore, we find the Oregon court in each case where more than a life estate was given, ruling that the devisee shall be vested with the full fee simple title at the earliest moment when he would be permitted to enjoy the same under the terms of the will,—that is restricing the limitations to death before the testator,

or in the event there is a preceding life estate to death before the death of the life tenant.

Summarizing the Oregon cases then, the one most closely in point on the facts is that of *Imbrie vs. Hartrampf,* supra, in which, we believe, the Oregon Supreme Court rejected the "death at any time" doctrine and adopted the substitutional construction. In addition, the court had previously (*Love vs. Walker*) recognized that the substitutional rule is the majority rule in the United States. It is submitted, therefore, that if the question were presented in the Oregon courts today the substitutional rule would be followed.

With these legal principles in mind, we turn now to

THE PROVISIONS OF THE WILL

For convenience, the will is here set out in full:

"In the Name of God, Amen: I, Lucy A. H. Deady, of Portland, Oregon, widow of the late Matthew P. Deady, make this the following my Last Will and Testament, that is to say:

First: I will and direct that all my just debts and funeral expenses be paid.

Second: I request and direct that my body be interred by the side of my late husband, Matthew P. Deady, in Riverview Cemetery.

Third: Subject to the conditions, provisions and charges thereon hereinafter made, I give, devise and bequeath to my son Henderson Brooke Deady, the undivided two-thirds of Lot

numbered One (1) in Block numbered Two Hundred and Twelve (212) of the City of Portland, Oregon.

Fourth: Subject to like conditions, provisions and charges thereon, I give, devise and bequeath to my two grandsons, Matthew Edward Deady and Hanover Deady, the remaining undivided one-third of said Lot 1, Block 212, Portland, Oregon.

Fifth: I direct that from the income derived from said Lot numbered 1 in Block 212, there be paid to Mary E. Deady, widow of my deceased son, Edward Nesbith Deady, the sum of $150.00 per month during the term of her natural life, and that there be paid to Marye Thompson Deady, who was the wife of my son Paul R. Deady the sum of $75.00 per month, so long as she survives and remains unmarried.

I further direct that the remainder of the income derived from the real property, shall be distributed as follows:

(a) To the payment to each of my grandsons —Matthew Edward Deady and Hanover Deady, the sum of $100.00 per month, and the remainder of said income shall be paid to my son, Henderson Brooke Deady. Such division of the income derived from the said real property to continue during the lifetime of my son, Henderson Brooke Deady.

Provided further, that from the income derived from said real property, and before the distribution of the same, there shall be paid therefrom, the inheritance tax properly chargeable against my estate, or the legacies or divisions made, and after the payment of such inheritance tax, there shall be created a sinking

fund of not less than $1000.00 nor more than $2500.00 per year, in discretion of my Executors, for the purpose of retiring and paying off the mortgage debt created and existing against said Lot numbered 1 Block numbered 212.

Sixth: I will and direct that said Lot numbered One (1) in Block numbered Two Hundred and Twelve (212), Portland, Oregon, shall neither be mortgaged, partitioned, sold, or otherwise encumbered by my devisees except for the improvement of the same, until the expiration of twenty-five (25) years from the date of my decease, and the devises to my said son Henderson Brooke Deady, and to my grandsons, Matthew Edward Deady and Hanover Deady, contained in items three and four hereof, are upon the express condition that said property shall not be disposed of or encumbered during the period aforesaid. Provided, however, that said real property may be encumbered by mortgage to renew the present mortgage, or such portion thereof as may from time to time remain unpaid.

Seventh: That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212, shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons.

Eigth: I authorize and permit my son Henderson Brooke Deady, if he so elects to do, to bequeath by last Will and Testament to his wife, (if he then has a wife,) the income that would have been derived by him if living, from the two-thirds of Lot 1 Block 212, City of Portland. Such bequest to continue only during the life

time of the widow of said Henderson Brooke Deady.

Ninth: The monthly payments directed to be made to my grandsons, and the residue of income directed to be paid to my son Henderson Brooke Deady, provided for in Item Fifth of this Will, shall continue for a period of ten years after my death, and thereupon and thereafter the net income derived from said Lot 1 in Block 212 of the City of Portland, shall follow the title and ownership of said real property, and shall be distributed, two-thirds to my son Henderson Brooke Deady, and the remaining one-third to my two grandsons, subject to the payment of the legacies bequeathed to Mary E. Deady and Marye Thompson Deady, in said Fifth item specified. It is my wish that my executors provide out of the residue of the income bequeathed to my son, Henderson Brooke Deady, in Item Fifth, funds at their discretion, to further any legitimate or worthy ambition or aim, other than business ventures, which my grandsons Matthew Paul and Hanover or either of them, may undertake or entertain.

Tenth: I give, devise and bequeath to my son Henderson Brooke Deady, that certain parcel of real estate situated and being in Mountain View Park heretofore conveyed to me by my son Edward Nesmith Deady.

Eleventh: I give and bequeath to my grandson Hanover Deady my law library.

Twelfth: All the rest, residue and remainder of the property of which I shall be seized, of whatever nature and wheresoever situated, I give, devise and bequeath to my son Henderson Brooke Deady and to my grandsons Matthew Edward Deady and Hanover Deady; to Hender-

son Brooke Deady the undivided two-thirds thereof, and to Matthew Edward Deady the undivided one-sixth thereof, and to Hanover Deady the remaining undivided one-sixth thereof.

Lastly: I hereby nominate and appoint my son Henderson Brooke Deady, and my friend Joseph Simon, of Portland, Oregon, to be the Executors of this my last Will and Testament, and also Trustees to manage my estate, and I direct that no bond or security shall be required of them as such Executors or Trustees. I also direct that in the event of the death, resignation or disqualification of all of my said Executors, and Trustees herein named, the Security Savings and Trust Company, of Portland, Oregon, shall then complete the execution of said Estate, and serve as Trustee thereof.

I hereby revoke all former Wills by me at any time made.

In Witness Whereof, I have hereunto set my hand and seal this the 29th day of July, A. D. 1920, at Portland, Oregon.

(Signed) Lucy A. H. Deady (Seal)

The above instrument of writing was signed by Lucy A. H. Deady, the Testatrix therein named, in the presence of us, who at her request and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto.

(Signed) Chester V. Dolph
Residing at Portland, Or.

(Signed) J. V. Beach
Residing at Portland, Or."

Taking up the provisions seriatim, we may pass over the first two paragraphs providing for the payment of her debts and the interment of her body.

Paragraph three devises to Henderson the undivided two-thirds of the property here in question, *"subject to the conditions, provisions and charges thereon hereinafter made."* This paragraph cannot be considered apart from the following paragraph four which provides that *"subject to like conditions, provisions and charges thereon"*, the remaining undivided one-third is devised to defendants Matthew and Hanover.

The gifts in these two paragraphs are couched in identical language, and by their express terms the interests given are subject to *exactly the same* "conditions, provisions and charges" Consequently it must be observed at the outset that the interest given to Henderson is of exactly the same *character* (although twice as large) as that given to Matthew and Hanover. No one has ever contended that Matthew and Hanover did not receive a fee in at least the one-third referred to in Paragraph 4, and the conclusion is inescapable, taking the Will thus far, that the same character of interest is given to each, and that the "conditions, provisions and charges" referred to must apply to all three devisees equally or not at all.

Furthermore, the language presumptively creates a fee in each of them unless the "conditions,

provisions and charges" are clearly such as to derogate *from the estate itself* and not merely from the income or from some other *attribute* of the estate. Thus a mere charge on the income or an attempted accumulation or restraint on alienation would not affect the passing of the fee, but, if valid at all, would merely restrict its use.

It is the statutory rule in Oregon that words of inheritance are not necessary to create a fee simple, and a devise is presumed to be of all the testator's interest unles an intent to devise a lesser estate *clearly appears from the Will.*

O.C.L.A., Sec. 18-603; 70-105. (Quoted supra, p. 8.)

Under the Oregon statute, confirming the common-law rule, it is held that a fee once given will not be held to have been debased or cut down by subsequent words of vague or doubtful import, but such intent must be *clearly expressed.*

(Proposition No. IV, supra, p. 8.)

Defendants argue that the "subject to" clause gives notice that an absolute fee was not intended, but merely a qualified or defeasible one. This could be true only in the event that some subsequent clause clearly provided for the *disposition of the property itself* and did not deal merely with the income or other attributes, for in the latter event the qualification would not affect the passing of the fee. Furthermore, the qualification would still

have to be one applicable to Matthew and Hanover as well as to Henderson, for the "subject to" clause, by express language, refers only to conditions, provisions and charges which are applicable to all three equally.

Paragraphs 3 and 4, therefore, taken by themselves, must be held to have devised a fee in two-thirds to Henderson and one-third to Matthew and Hanover, unless the later restrictions are such as clearly affect *the estate itself,* and not merely some of the *attributes* of the estate. Likewise the same restrictions must apply to all three of the devisees in exactly the same manner, or not to any of them.

Paragraph five sets up certain "charges" on the income from the property, namely the payment of the sum of $150.00 per month to Mary, widow of Edward, for her lifetime; $75.00 per month to Marye, widow of Paul, for her life; $100.00 each per month to Matthew and Hanover during the lifetime of Henderson; and the remainder of the income to Henderson for his life. In each instance, the testatrix uses apt language to express her intent as to the duration of the charge—i. e. "to Mary . . . during the term of her natural life"; "to Marye . . . so long as she survives'"; and to Matthew, Hanover and Henderson "during the lifetime of my son, Henderson." From this it must be inferred that if she had intended any such similar limitation on the estate given to Henderson, she would clearly have expressed it. As stated in the *Imbrie* case, supra,

"it would have been the most natural thing for whoever drafted the will to have used the words 'during his natural life' or words of like import" (100 Oreat 595).

With respect to the latter charges,—i. e. to Matthew, Hanover and Henderson—it should be noted that their duration is further limited by Paragraph 9 to ten years from the death of the testarix, instead of the full lifetime of Henderson, as in Paragraph 5, after which period of ten years the income is to *"follow the title and ownership of said real property"*—two-thirds to Henderson and one-third to Matthew and Hanover, subject to the charges in favor of her daughters-in-law.

Paragraph 5 sets up, as an additional charge on the income, the payment of inheritance taxes and the accumulation for an indefinite period of a certain portion of the income from the property in a sinking fund for the retirement of the mortgage debt thereon. Since there is no duration prescribed for the accumulation, and the period might outrun that permitted by the rule against perpetuities, the provision for the sinking fund is obviously invalid.

(Proposition No. V, supra, p. 9.)

Paragraph six attempts to impose a restriction on the alienation or encumbrance of the property, except for certain purposes, for an absolute period of twenty-five years after the death of the testatrix. The attempted restraint is expressly made a "*con-*

dition" to the devises to Matthew, Hanover and Henderson. This provision likewise violates the rule against perpetuities and against restraints on alienation, inasmuch as it is based on an absolute period in gross greater than twenty-one years and is repugnant to the nature of an estate in fee, which was unquestionably granted at least to Matthew and Hanover.

(Proposition No. V, supra, p. 9.)

It is believed that defendants do not question the invalidity of the provisions for the accumulation and the restraint on alienation or incumbrance, but argue merely that plaintiff has no standing to raise the question until he first establishes an interest in the property. It is submitted that the discussion herein will show conclusively that he does have such an interest, but the relevancy of the inquiry is not limited to that event, for the invalidity of these portions is itself a strong ground for holding that Henderson acquired a full fee to two-thirds of the property upon the death of the testatrix.

It is settled that where the invalid portions of a Will are so closely interwoven with the valid ones that they cannot be separated without seriously upsetting the general testamentry scheme, the entire plan of distribution will be held invalid.

(Proposition No. VI, supra, p. 9.)

When the entire Will has been considered, it will be apparent that the plans of the testatrix with

respect to this property were inextricably bound up with the attempted restraint on alienation and the attempted accumulation of the income, so that if those features were to be excised, her plan would be seriously disrupted, and the entire scheme should therefore fail. In that event, the property would go by the residuary clause in Paragraph 12, two-thirds to Henderson and one-sixth each to Matthew and Hanover.

Furthermore, in Pragraph 6, the testatrix states explicity that the previous devises to Matthew and Hanover and to Henderson "are upon the *express condition* that said property shall not be disposed of or encumbered" during the unlawful period of twenty-five years. The only conclusion to be drawn from this language is that if such disposition or encumbrance were made, or if the condition could not be enforced, the devise was not intended to be effective. In that event, since no alternative disposition is made, the property would have to go by the residuary clause.

The restraint on alienation in Paragraph 6, though invalid, is of further significance, however, in that it indicates that at the end of the twenty-five-year period Mrs. Deady intended that the respective devisees should have full power of alienation or encumbrance over the described property. A restriction on alienation for a limited term carries with it an implied grant of the power of aliena-

tion at the expiration of that term. (*Imbrie* case, supra, 100 Ore. at 595).

Likewise in this paragraph, the testatrix expressly recognizes the fact that the mortgage then encumbering the property might need to be renewed or refinanced. Yet in order to accomplish a refinancing of the mortgage, Henderson would need to have a fee simple title before his mortgage on the two-thirds interest would be acceptable. These factors corroborate the finding that Henderson was intended to have a full fee upon Mrs. Deady's death, just as it is admitted that Matthew and Hanover were to have.

Paragraph seven of the Will, which raises one of the crucial issues of the case, provides as follows:

> "That in the event my son Henderson Brooke Deady die without issue, the undivided two-thirds of Lot numbered 1 in Block numbered 212 shall vest in my grandsons hereinbefore named, and I give and devise the same to my said grandsons."

As pointed out above, it is plaintiff's contention that this clause has reference only to Henderson's death without issue *during the lifetime of the testatrix,* and since he outlived her, his fee simple in two-thirds became absolute, even though he later died without having had children.

The construction to be placed upon the phrase "die without issue", as regards the time for taking

effect of the gift over, has been considered above in the light of the cases.

(Propositions No. VII-X, supra, pages 10-14.)

Our concern at this point is with the *actual intent* as it can be gleaned from the Will itself, apart from rules of construction.

At the outset, we may state simply that when a testatrix obviously has so little regard for the rule against perpetuities and related rules of law as in the present case, it would be entirely consistent with her expressed intent to give the phrase "death without issue" its settled common-law meaning of indefinite failure, and to say that she was actually attempting to create a future interest to become effective whenever his issue might fail *at any time.* Such a limitation would of course be void for remoteness, but as is pointed out in *Closset vs. Burtchaell,* 112 Ore. 585 at 601,

> "Every provision of a will or settlement is to be construed as if the rule did not exist, and then to the provision so construed the rule is to be remorselessly applied."

On the other hand, if we say that the testatrix was thinking only of the death of Henderson without *children*—i. e. some form of *definite failure,* whether to take effect on her own death, on Henderson's death, or at some intermediate date—then it seems clear from the entire Will that she would want his estate to fully vest in him upon her own

death. That is, the gift over was by way of substitution, rather than by way of executory devise, and was to take effect, if at all, *upon her own death,* if Henderson had died without issue *prior to that time.*

It should first be observed that after Paragraphs 3 and 4 have devised the fee, the rest of the complicated structure of legacies and restrictions, with the exception of Paragraph 7, has nothing whatever to do with the devolution of the fee itself. There has been an express *condition* set up in the attempted restraint on alienation; *provision* has been made for a sinking fund to retire the mortgage; and the income has been *charged* with certain payments. The "title and ownership" of the land, however, remain throughout divided two-thirds to Henderson and one-third to Matthew and Hanover. There is nothing in the Will, therefore, to derogate in any way from the fee expressly given in Paragraphs 3 and 4 unless it be the "death without issue" clause in Paragraph 7.

It is equally clear, however, that Paragraph 7 is not one of the "conditions, provision and charges" referred to in Paragraphs 3 and 4, since by the express terms of those paragraphs, the "conditions, provisions and charges" are stated to be identical for the gifts to Henderson, Matthew and Hanover, while Paragraph 7 can obviously refer only to the devise to Henderson and has no application to the gifts to the grandsons. Therefore, since the testatrix placed certain limitations upon the gift to

Henderson, but did not include this provision among those limitations, a question is raised as to just what effect she intended Paragraph 7 to have. It has been pointed out above (Proposition No. IV, supra, p. 8) that a fee once given will not be cut down by subsequent words unless the intent is *clearly and expressly stated,* and since Paragraph 7 does not clearly express such an intent but serves only to introduce uncertainty, it must be held that this clause does not operate to debase or cut down the fee previously given.

Likewise, the position of Pargraph 7 in the Will, embedded in a series of provisions dealing with the income rather than with the fee, does not serve to clarify the intent, but increases the doubt that she thereby intended to cut down the fee.

The mere fact that the fee given to the grandsons was to be enjoyed by them upon terms which had no relation to the death of Henderson is of itself a convincing argument that the gift to Henderson was upon the same terms and was not intended to be cut down.

Defendants place great reliance upon the use of the word "vest" in this pargraph, arguing that the property could vest in Matthew and Hanover only upon Henderson's death occurring after that of Mrs. Deady, and therefore that she must have intended the gift over to take effect only after her own death. The argument is a complete *non sequitur,* however, for it is just as reasonable to say

that the gift over to the grandsons would vest in them (as it surely would) *upon Mrs. Deady's death,* if Henderson had died during her lifetime. In fact, the use of the word "vest" is much more consistent with plaintiff's theory, in the light of the present tense of the rest of the clause:

"I give and devise the same to my said grandsons."

This language clearly seems to be speaking *as of the time of her death;* and if, *at that time,* Henderson had died without issue, then her Will would operate as a present devise to them, the property to "vest" in them immediately. This seems to indicate an intent to *substitute* the devise to the grandsons for that to Henderson, *on her own death,* if at all.

Defendants also argue that if Mrs. Deady had intended a substitutional devise only, the gift over would have been unnecessary, because if Henderson had predeceased Mrs. Deady, Matthew and Hanover would have taken all of Henderson's interest under the Will, by virtue of the Oregon laws of descent.

This implies a misconception of the Oregon lapse statute, and rather than supporting defendants contention, it illustrates perfectly the practical reason why Mrs. Deady must have intended a substitutional devise. The Oregon statute preventing lapse of a devise is applicable only where the devisee leaves *lineal descendants.* It would not oper-

ate to transfer a devise to nephews of the deceased devisee, such as were Matthew and Hanover. We quote the entire section, O.C.L.A. Sec. 18-604:

> "*When issue of deceased devisee takes estate.* When any estate shall be devised to any child, grandchild, or other relative of the testator, and such devisee shall die before the testator, leaving *lineal descendants,* such descendants shall take the estate, real and personal, as such devisee would have done in case he had survived the testator." (Italics supplied.)

It is obvious that under this statute, if Henderson had predeceased the testatrix, without issue, the gift to him would have lapsed, for Matthew and Hanover were not *lineal descendants of his,* so as to invoke the lapse statute. Instead of taking Henderson's share under the Will therefore, Matthew and Hanover would have taken it as on *intestacy,* as the only lineal descendants *of Lucy.*

> "When any person shall die seized of any real property . . . . . not having lawfully devised the same, such real property shall descend subject to his debts, as follows: (1) in equal shares to his or her children, and to the issue of any deceased child by right of representation; and if there be no child of the intestate living at the time of his or her death, such real property shall descend to all his or her other lineal descendants." O.C.L.A. Sec. 16-101.

By taking the property under intestate succession, however, the grandsons would take it *free*

from all the "conditions, provisions and charges" which Lucy had attempted to impose by her Will, and thus we have a very cogent reason why Lucy was concerned with the event of Henderson's death before her own.

One of the outstanding things about the Deady Will is the elaborate structure of legacies and restrictions which she attempted to set up about this property. She provided monthly incomes for her daughters-in-law, for her grandsons and for Henderson; she charged the income with the payment of the inheritance taxes; she attempted to set up a sinking fund from the income to retire the mortgage debt; she attempted to restrain the alienation or encumbrance of the land for a period of twenty-five years—all these apparently with the view of keeping the property itself intact, and providing for the family out of the income alone.

But this entire scheme would fail if Matthew and Hanover took the two-thirds by intestacy, freed from the restrictions of the Will; for then they would be free to dispose of or encumber that interest at their pleasure, ignoring the legacies to their aunts if they so wished. This was the *very thing* that Mrs. Deady was attempting to prevent, and it would happen *only* in the event that the primary devise to Henderson should lapse by his death without issue *prior to her own death.*

If he outlived her, there would be no lapse, but the property would stay subject to the Will in any

event. If he died before her death, leaving issue, his descendants would take his share by virtue of the lapse statute, again subject to the Will. But if he died *before her death without descendants,* the devise to him would lapse, and that share would go by intestacy free from all her intended restrictions. This reason, if there were no other, would itself be convincing that the contingency with which she was principally concerned and for which she attempts to provide by Paragraph 7 was the event of Henderson's death without issue *during her own lifetime.* She provides that in that event, Matthew and Hanover would take his share, *subject to* the charges and restrictions in the Will.

It is submitted therefore, that the plan of the testatrix will best be effectuated, and her intent most nearly carried out by construing Paragraph 7 as a *substitutional* devise, to take effect *on her own death,* only in the event that Henderson had died without issue *prior to that time.* Since he outlived her, his fee became absolute and passed to his widow and then to the present plaintiff, even though he eventually died without leaving children.

Paragraph eight of the Will makes provision for the widow of Henderson out of the income of the property similar to that made in Paragraph 5 for the widows of the other two sons. By it, Henderson was authorized and permitted to bequeath to his wife (if he then has a wife) for her lifetime,

the income that would have been derived from the property by him if living.

Defendants attach great significance to this pargraph, arguing that it would have been unnecessary if Henderson had taken a full fee in the two-thirds, and that it therefore shows that he was not intended to have the fee. But this argument completely ignores the effect intended by the testatrix that the restraint on alienation should have:

> "The devises . . . . are upon the express condition that such property shall not be disposed of or encumbered during the period aforesaid." (Par. 6).

If that restraint had been valid, Henderson could not have devised the fee to his widow if he died prior to the twenty-five-year period, unless perhaps to take effect on the expiration of the period, although it is doubtful whether that would have been valid, since it might not have vested within twenty-one years from his death. The power of appointment in Henderson was obviously to enable him to provide for his widow in the event that he died during the twenty-five-year period when the testatrix intended that he should not have a power of alienation.

The fact that Henderson exercised this power by his will is likewise of no great aid to defendants, for it merely shows that he recognized the restraint on alienation which his mother had attempted to

impose. Even though that restraint was not legally binding upon him, he apparently recognized it as a moral obligation. His acquiesence did not validate the restraint, and when the rule of law steps in to strike it down, his rights are not to be prejudiced merely because he heeded the expressed, though invalid, desire of his mother.

Defendants likewise contend that the power of appointment in Paragraph 8 shows that in the seventh paragraph Mrs. Deady was referring to Henderson's death without issue *after* her own death and not *before,* arguing that the power would lapse if Henderson predeceased her. But it does not follow, even if the testatrix had in mind his death after her own in this respect that she therefore had the *same date* in mind with respect to the provision for his death without issue. She may well have considered both possibilities in separate parts of the Will.

As shown above, we believe she intended that if Henderson survived her he would take a full fee, and yet be unable to devise or convey that fee because of her attempted restraint on alienation. It is entirely consistent with her expressed wish that she intended (1) if he predeceased her without issue, although his fee would be defeated, he could continue his share of the income to his widow; and (2) if he survived her, though his fee would be complete, he would still be unable to devise it because of the twenty-five-year restraint, and the power of

appointment was a means for providing for his widow in that event.

However, if the power were taken to refer only to the death of Henderson *after* her own death, as defendants urge, it would also be void for remoteness, because there is no certainty that Henderson's widow would be a person in being at the time of Lucy's death, or that the charge in her favor would not run for a period greater than 21 years after lives in being at Lucy's death. This possibility is expressly recognized in the Will in the parenthetical clause "if he then has a wife". If, as suggested by defendants, therefore, the power would lapse if it referred to his death *prior* to hers, it would in the alternative be void if it referred to his death *after* her own.

It is not conceded, however, that the power could not be validly exercised prior to Mrs Deady's death. It is true that a general power of appointment, which would permit the donee of the power to transfer the property to anyone he should name, is ordinarily said to lapse upon the death of the donee. However, the actual reason behind the decisions usually is that the donee of the power has in his Will merely made mention of "any and all powers of appointment" and actually had no intention to exercise the particular power, perhaps because he had no knowledge of it prior to the death of the donor. The special power given in the Will of Mrs. Deady, however, might be exercised by a document

executed before her death, provided the donee of the power clearly intended to exercise that particular power of appointment. This is pointed out in 49 C. J. 1284 where it is stated:

> "A power may be validly exercised by a Will executed prior to the creation of the power, where the intention to exercise such a pwer appears."

This actually occurred in the case of,—

Title Guaranty & Trust Co. v. Ebaugh, 184 N. Y. Supp. 351,

where on February 21st the donee of the power was told that the trust containing it was going to be created, on the 18th day of April he executed the power, and the trust was thereafter created on July 3rd. This was held to be a valid execution of the power given in the trust.

Likewise in the case of,—

Stone v. Forbes, 189 Mass. 163 at 168; 75 N. E. 141.

the court pointed out:

> "It is settled in this Commonwealth that a general power of appointment is well executed, in the absence of anything to show a contrary intention, by a general residuary clause in the will of the donee of the power. Armory v. Meredith, 7 Allen, 397. Willard v. Ware, 10 Allen, 263. Bangs v. Smith, 98 Mass. 270. Sewall v. Wilmer, 132 Mass. 131. Cumston v. Bartlett, 149 Mass. 243. Hassam v. Hazen, 156 Mass. 93. And, whatever may have been the case formerly, that is now the law in England. Airey

> v. Bower, 12 App. Cas. 263. Boyes v. Cook, 14 Ch. D. 53. *And both in this Commonwealth and in England the fact that the power is created after the execution of the will does not prevent the will from operating as an execution of the power.* Willard v. Ware, 10 Allen, 263. Osgood v. Bliss, 141 Mass. 474. Airey v. Bower, ubi supra. In England these results have been arrived at by means of statutory enactments. But in this Commonwealth they have been reached by the application of general principles. In this case, however, the power is a special one, and it is contended that different rules apply."

And as stated by the editors of Am. Juris. at 41 A. J., 835,

> "There seems to be no reason why a special power cannot be executed by a will of prior date, if the proper intent can be gathered from the will."

In the present case, where the beneficiary of the power is specifically designated, as well as the interest to be appointed, and the circumstances are such as to indicate that Henderson might well know of the existence of the power prior to the death of Mrs. Lucy Deady, there is certainly the strongest case for holding that the exercise of the power prior to the death of the testatrix would be valid.

Furthermore, even in jurisdictions where it is stated that a power lapses on the death of the donee, the same result has been reached by the doctrine of *incorporation by reference,* which gives effect to

the donee's will, where that is the clear intent, even though the donee may in fact have predeceased the donor. As stated by Justice Cardozo in the case of *In re Fowle's Will,* 222 N. Y. 222, 118 N. E. 611, 612-613, cited by defendants:

> The intent to avert the consequences of a lapse is clear. The only question is whether the intent is one to which the law will give effect. One obstacle, and one only, can be thought of. That is the rule against the incorporation of extrinsic documents, testamentary in character, but not themselves authenticated in accordance with the statute. It is said that this rule is violated when a testator, to keep a power alive, ratifies its execution, adopts the will which executes it as his own, and thus in effect averts a lapse. We do not share that view.
>
> Everything that this testator did is justified by our decision in Matter of Piffard, 111 N. Y. 410, 414, 415, 18 N.E. 718, 719 (2 L.R.A. 193). * *
>
> Piffard's case cannot be distinguished. It ought not to be overruled. Only the clearest error would warrant us in baffling the just hopes and purposes of this testator by disregarding a decisive precedent. But there are substantial reasons to support the view that the decision was right. The reasons may appeal with different strength to different minds. * * *
>
> It is plain, therefore, that we are not to press the rule against incorporation to 'a dryly logical extreme.' Noble State Bank v. Haskell, 219 U. S. 104, 110, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487. We must look in each case to the substance. We must consider the reason of the rule, and the

evils which it aims to remedy. But as soon as we apply that test, the problem solves itself. There is here no opportunity for fraud or mistake. There is no chance of foisting upon this testator a document which fails to declare his purpose. He has not limited his wife to any particular will. Once identify the document as her will; it then becomes his own. He authorizes her to act, and confirms her action. Condit v. DeHart, supra, at page 81 of 62 N. J. Law at page 776 of 40 Atl. For the purpose of the rule against incorporation, the substance of the situation is thus the same as it always is when a will creates a power. The substance is that a power which would otherwise have lapsed has been kept alive by the declaration that its execution, however premature, is ratified and approved. But the execution of a power does not violate the rule against incorporation. It can make no difference for that purpose whether the execution is authorized in advance or made valid by relation."

In *Matter of Piffard,* 111 N. Y. 410, 18 N. E. 718, 2 L. R. A. 193, referred to in the foregoing quotation, it was stated that the will of the donee (who died before the power became effective on death of the donor) is referred to,—

"not as transferring the property by an appointment, but to define and make certain the persons to whom, and the proportions in which, the one-fifth should pass by the father's will in case of the death of the daughter in his lifetime."

In the present case, it is not even necessary to

look to the donee's Will to ascertain those facts, for the ultimate beneficiary and the amount of the interest to pass are both ascertained by the Will of the donor herself. The present case is certainly a much stronger one, therefore, for upholding the validity of a prior exercise of the power

As stated at the outset, however, even if Lucy did have in mind the event of Henderson's death *after* her own with respect to the power of appointment, it by no means follows that she necessarily had the same event in mind with respect to the failure of issue, as defendants seek to infer

Paragraph nine provides that the monthly payments to Matthew, Hanover and Henderson, previously set up in Paragraph 5, shall be limited to ten years after her death instead of for Henderson's life as provided in Paragraph 5. At the end of the ten-year period, the net income, after payment of the legacies to the widows of the other two sons, "shall *follow the title and ownership* of said real property, and shall be distributed, two-thirds to my son Henderson Brooke Deady, and the remaining one-third to my two grandsons."

This provision alone is certainly strong evidence that Henderson was to receive a full fee to the two-thirds of the property, since the clause refers to "the title and ownership" in him of that amount.

Paragraph ten devises certain other real estate to Henderson, concerning which no question is

raised, and Paragraph eleven bequeathed to Hanover the law library of the testatrix.

Paragraph twelve provides that all the residue of the testatrix' property shall go in the proportion of two-thirds to Henderson and one-sixth each to Matthew and Hanover, thus indicating, along with the other provisions of the Will, the general plan of the testatrix to divide her estate in that proportion—two-thirds to the surviving son and the remaining one-third to the grandsons. Henderson was the chief beneficiary of her Will and the primary object of her bounty.

By the last clause of her Will the testatrix named Henderson and Joseph Simon as co-executors. The fact that she provided for a co-executor indicates that she had in mind the possibility of Henderson's not surviving her, and this again is of weight in determining that Paragraph 7 referred to the death of Henderson within her own life.

THE WILL AS A WHOLE

Viewing the Will as a whole, therefore, certain features are outstanding which characterize the entire instrument. One of the first of these is that the Will was obviously drawn by a lawyer—it is phrased in technical language and replete with conditions, charges, powers, devises and legacies. Having used words of settled legal significance, she is presumed to have intended their technical mean-

ing, for her attorneys were undoubtedly merely phrasing the Will to give expression to her intent.

Another feature immediately apparent is that Henderson was the chief object of the testatrix' bounty. He was her sole surviving, and apparently favorite son. He is the first devisee mentioned; he is given the largest share of the realty, the largest share of the income, and the largest share of the residuary estate. Another parcel of land is given to him in fee simple. He is named as a co-executor of the Will. Clearly, if there is anyone for whom Mrs. Deady would have desired to create an absolute estate, it was for her son Henderson; and her natural desire coincides with the statutory presumption that she intended to give him her entire estate in the land unless her intention to give a lesser amount is clearly expressed in the Will. But nowhere in the Will can there be found any such clearly expressed intent to debase or cut down the fee given by the primary devise, although it would have been the simplest matter for her attorneys to have so stated if that had been her desire.

The next outstanding thing about the Will is the elaborate structure of legacies by which she attempted to provide for the family out of the income from the property. To insure that this comprehensive scheme would be carried out, she subjected the primary devises to the payment of the specified charges, provided for the retirement or refinancing of the mortgage debt, and attempted to restrain the

alienation or encumbrance of the land for a period of twenty-five years. Obviously that construction of the Will should be adopted which most nearly gives effect to her desires, so far as that can legally be done.

As pointed out above, the greatest threat to this plan—apart from the rule against perpetuities—was the possibility that Henderson might predecease her without issue, so that his share would lapse and go to Matthew and Hanover as on intestacy, free from all the restrictions which she had attempted to impose. A lapse was to be feared only if he died without issue prior to her death, and it was largely for this purpose, it is believed, that the death without issue clause was inserted—to prevent a lapse and insure that if Matthew and Hanover did take Henderson's share, they would take it subject to the terms of the Will and not free from her restrictions.

When this very practical reason harmonizes so well with the substitutional construction which the Oregon Supreme Court recognizes as being the weight of authority, it is submitted that the clause must be held to refer only to Henderson's death without issue *during the lifetime of the testatrix*, and that upon his surviving her, he took an absolute estate in fee which passed by successive devises to the present plaintiff.

NO TRUST CREATED

We believe it is apparent without extended discussion that there was no real trust created under the Will. Although the testatrix used the word "trustee", the fee title was granted to the grandsons and to Henderson. The executors were merely given the right to collect and distribute the income, pay the specific legacies and create a sinking fund. The power to renew the mortgage was given to the fee owners, and the restriction against alienation was placed directly against them, not against the executors. As pointed out by the Oregon Supreme Court in the recent case of *D'Arcy vs. Snell,* 162 Ore. 351, 364:

> "9. The fee title to and ownership of the real property of a decedent passes immediately on his death to his heirs or devisees subject only to the payment of the debts of deceased and the right of the personal representative to possession for the purposes of administration: *King v. Boyd,* 4 Or. 326; *Noon's Estate,* 49 Or. 286, 291, 88 P. 673; *De Bow v. Wollenberg,* 52 Or. 404, 96 P. 536, 97 P. 717; *Stadelman v. Miner,* supra; *MacKenzie v. Graham,* 159 Or. 687, 82 P. (2d) 884."

PARTIES

As to the alleged absence of necessary parties, it should be sufficient to point out that recovery is not being sought here for the benefit of either the estate of Henderson or Charlotte Howell Deady, but rather for the son of Charlotte, and he is *still living.* The

present plaintiff is the owner by successive devises of whatever interest either Henderson or Charlotte had to devise, and title passed to him immediately upon the death of his mother (*D'Arcy vs. Snell,* supra). He is the real party in interest and the only one to whom any recovery could accrue. What possible interest the executors of the two estates could have is not readily perceived.

EVIDENCE ADDUCED AT THE TRIAL

Admissibility

As to those portions of the offered evidence which were excluded by the trial court, the following observations should be sufficient:

(a) As to the oral expressions of the testatrix (Tr. 264-70, 385-7, 390-4, 399-401, 406-7, 411-15), the rule is clear that parol evidence is not admissible to explain, modify or vary the construction of a Will. (Proposition No. XIV, supra, page 16). While construction was required, there was no ambiguity in the Will as to the devolution of the fee. If parol evidence of the estatrix were admissible in this case it would be so in any case, and the formalities surrounding the execution of a Will would be entirely destroyed.

(b) The acts or statements of the executor of Henderson's estate (Tr. 205-7, 212-3) are not in any way binding upon the present plaintiff because there is no privity of interest between them. The trial court

admitted declarations of Henderson himself, partly on the theory that they might be admissions of a prior holder of the title. But the executor of the estate does not hold the title to the property, merely having possession for the purposes of administration, and no act of his could be in any way binding on a subsequent holder of the fee. In addition, of course, they are purely hearsay—the acts of one not a party to the suit, offered as proof that what they purport to say is true.

(c) Likewise, any statements that Chester Dolph may have made to Mr. Weinstein (Tr. 224-5) were between persons not parties to this case, reporting in turn matters which others were alleged to have told Mr. Dolph, and not binding in any way upon the present plaintiff.

(d) The matters with regard to the State Inheritance Tax were properly excluded. As the trial court stated (Tr. 121), what relevancy these matters might have is inconceivable. "The state will not be foreclosed from collecting what the law allows."

(e) The letters sought to be introduced as defendants' exhibits "Q" and "R", being letters from Wilbur, Beckett & Howell to Simon and the reply (Tr. 445, 451) were of course properly rejected as being entirely hearsay, between persons not parties to the litigation, and attempting to report matters coming from still a third party.

Effect of the Evidence

As we understand the defendants' contentions, they seek to establish chiefly two things by the evidence offered at the trial: (1) a waiver or estoppel of some sort against Henderson; and (2) a practical construction of the will by the interested parties.

With respect to the first of these, it is submitted that the elementts of an estoppel are not present, because even assuming that Henderson had told the others he did not take an absolute fee under the Will, this was at most a statement of law or opinion merely and not of fact. Furthermore, if he had made such statements, Matthew and Hanover would have had no right to rely on them, because they had as complete a knowledge of the facts as he did, and they were advised by counsel who knew the terms of the will and were better qualified to form an opinion than was Henderson. Mere silence on Henderson's part is of no avail to defendants, for he was under no duty to speak up and advance his contentions.

Likewise the evidence falls far short of establishing a waiver, because there is no "intentional" relinquishment of a known right." The most that could be said is that Henderson might have been mistaken as to his rights as a matter of law.

As to a practical construction by the interested parties, extrinsic evidence of that nature is admissible only where the will is clearly ambiguous, and the

extrinsic evidence itself is unequivocal.

Campbell v. Fowler, 226 Ky. 548; 11 S. W. 2d 423, 428.

Eagen v. Commissioner, 43 F (2d) 881, 71 A. L. R. 863 (5 Cir.).

Bishop v. Howarth, 59 Conn. 455, 22 A. 432.

As pointed out above, in the present case there is no ambiguity as to the devolution of the fee when the will is considered by itself, and evidence of this nature could only serve to introduce uncertainty.

However, we have carefully considered the Annotations cited by defendants from 67 A. L. R. 1272 and 94 A. L. R. 245, and it is believed that all of the cases cited therein will fall into one or more of the following classes, based on their respective facts:

(1) Where the property of the decedent has been divided and entirely distributed according to a certain construction of the will, and all parties have acquiesced in the division for a considerable period of time;

(2) Where there has been a specific agreement of the parties to a certain plan of distribution, expressly arrived at. Where this is in the nature of a family settlement, the courts will go to some lengths to uphold it;

(3) Where the parties have disposed of the property among themselves or to outsiders on the assumption of ownership, and to upset the arrangement would injure innocent parties;

(4) Where the litigant against whom the construction is offered was himself a party to the construction, so that it is in the nature of an admission.

In those kinds of cases, the construction is received as *independently binding* on the parties. But when the construction is offered as tending to prove the *intent* of the testator, then it is rejected as parol evidence and pure hearsay.

(Proposition No. XV, supra, p. 17.)

In the present case, none of these factors are present, for the property of the decedent has remained intact, there has been no express agreement, no innocent third parties have intervened, and the present plaintiff was not in any event a party to the construction. Even though Henderson might have been a party to such a construction, this is not binding upon the present plaintiff as a vicarious admission. When admissions of a predecessor in title are received against a subsequent holder of the title, it is on the theory that the predecessor was in *similar circumstances* and had only the *same motives* as the present party, which is obviously not the case between Henderson and the present plaintiff (Wigmore on Evidence, 3rd Ed,. Sec. 1080).

The case of *Moore vs. Moore,* 121 Or. 48, 252 Pac. 964, cited by defendants involves several of these features, for there the will was held to be clearly ambiguous, and the family had joined in conveying the property to a managing trustee, the deed reciting

that each owned a one-eighth interest. Later, the defendant sold a one-eighth interest to another of the family under circumstances clearly indicating a desire to convey all her interest. When she later attempted to claim a larger share, the court construed the will against her claim on the grounds that the parties had adopted a contrary construction between themselves.

The case is clearly a remote one from the present case, because there the parties had embodied their construction of the will in a specific written agreement, the claimant had already sold her supposed interest to another, and the circumstances showed a family settlement acquiesced in by all the parties.

In *Stubbs v. Abel,* 114 Or. 610, 233 Pac. 852, cited by defendants, it does not appear that the construction by the parties was of any significance to the decision, the court expressly stating:

> "This will contains no ambiguity as to beneficiaries or as to things bequeathed or devised; and we shall not resort to surrounding circumstances for the purpose of imparting into the will an intention not therein expressed."

As far as the various stipulations signed by the family are concerned, it is apparent that none of them had for its purpose a construction of the will as to the devolution of the fee, but they were concerned only with redistributing the income on the basis of an entirely new and separate agreement.

In the negotiations all the parties were represented by counsel.

Before leaving the matter of the evidence introduced at the trial, however, there is one factor to which attention should be called. It appears (Defendants' Ex. D, Tr. 291) that prior to Mrs. Deady's death the property in question had belonged to her three sons in equal shares, subject only to a life estate in her favor. It had been so devised by her deceased husband, the late Judge Deady. In order to refinance the property the boys joined in conveying the fee to her. It was subsequently claimed by Marye Thompson Deady, widow of Paul, that the conveyance to Lucy was solely in trust, and that the fee should return to the heirs of the three sons equally. She brought suit to compel this result, but dismissed it upon receiving a larger share of the income. (Defendants' Ex. E, Tr. 307).

This is significant because it shows an additional reason why Lucy would have intended to convey only a one-third interest to Matthew and Hanover—the one-third which their father, Edward, had previously owned. Since Paul left no descendants, it was the most natural thing for her to leave Paul's share to Henderson, along with his own, and give Edward's share to his two sons.

IN CONCLUSION

It is submitted that the will itself, taken in its entirety, is perfectly clear in its intention to devise a fee to Henderson in two-thirds of the property, subject to the same "conditions, provisions and charges" as that of the grandsons, and subject to being defeated only if he died without issue *during the lifetime* of the testatrix. There is no need, nor any room, for extrinsic evidence, but if such is received it does not lead to any different construction. Plaintiff, as successor to the interest of Henderson, is the owner of an absolute fee in two-thirds; and the decree of the District Court was entirely correct, except in the particular hereinafter noted.

Cross-Appellant's Opening Brief

ASSIGNMENT OF ERROR

The trial court erred in denying to the plaintiff any right to the present income from the property during the lifetime of Marye Thompson Deady.

ARGUMENT

The trial court held that a trust was created by the stipulation of October 28, 1925 (Defendants' Ex. E, Tr. 307) by which Marye Thompson Deady's suit was settled. This stipulation increased her share of the income above that to which she was entitled under the terms of the will. The trial court held (Tr. 151) that since the present plaintiff was not therein mentioned, he cannot share in the income from the property until the termination of that trust upon the death of Marye.

It is deemed that little discussion is necessary. The trust was purely for the payment of the specified charges—$150 per month each to Mary and Marye, and $400 to Henderson—and after the payment of those charges there would seem to be no reason why the balance of the income should not follow the equitable ownership of the property. Henderson is of course no longer drawing a monthly income, and obviously the property is yielding revenue in ex-

cess of the other two charges. Plaintiff has no knowledge of how that money is being applied, but the trust does not direct it to be accumulated, and it is submitted that whatever income is derived over and above the monthly charges should be distributed in the proportion of the equitable ownership—two-thirds to Henderson and one-third to Matthew and Hanover.

Respectfully submitted,

MAGUIRE, SHIELDS, MORRISON AND BIGGS,
ROBERT F. MAGUIRE,
RANDALL B. KESTER,
JOHN SCOBLE,
Attorneys for Appellee and Cross-Appellant.